

JUN 7 2007

BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of

The Media Fund

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT  
) MUR 5440  
2007 JUN -1 P 2: 56

GENERAL COUNSEL'S REPORT # 6<sup>1</sup>

I.	ACTIONS RECOMMENDED.....	3
II.	BACKGROUND .....	3
III.	ANALYSIS .....	6
A.	The Media Fund Failed to Register and Report as a Political Committee In Accordance with 2 U.S.C. §§ 433 and 434 .....	6
1.	<i>The Media Fund Exceeded the \$1,000 Statutory Threshold by Receiving Contributions</i> .....	6
a.	The Media Fund's Solicitations Resulted in "Contributions" .....	9
b.	The Solicitations by the Joint Fundraising Committee on Behalf of The Media Fund Resulted in "Contributions" .....	11
2.	<i>The Media Fund Exceeded the \$1,000 Statutory Threshold by Making Expenditures</i> .....	12
a.	Express Advocacy Under 11 C.F.R. §§ 100.22(a) and 100.22(b) Extends Beyond "Magic Words" .....	13
b.	The Media Fund's Communications Contain Express Advocacy .....	17
3.	<i>The Media Fund's Major Purpose was Federal Campaign Activity</i> .....	17
4.	<i>Conclusion</i> .....	21
B.	The Media Fund Knowingly Accepted Excessive and Prohibited Contributions in Violation of 2 U.S.C. §§ 441a(f) and 441b(a) .....	22

<sup>1</sup> The Commission severed several respondents from MUR 5440 and opened new MURs with respect to them. See Corrected Certification (May 30, 2006). The Media Fund is the main respondent that remains in MUR 5440. Therefore, this document is designated "General Counsel's Report #6," and subsequent reports that address The Media Fund will continue from this number.

27044181298

C. Coordination .....	22
1. <i>Jim Jordan's Activity Did Not Result in Coordination between         The Media Fund and the Kerry Committee</i> .....	23
2. <i>Harold Ickes's Activity Did Not Result in Coordination between         The Media Fund and the DNC</i> .....	26
IV. CONCILIATION.....	29
V. RECOMMENDATIONS.....	31

27044181299

**I. ACTIONS RECOMMENDED**

(1) Find probable cause to believe that The Media Fund violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee; (2) find probable cause to believe that The Media Fund violated 2 U.S.C. §§ 441a(f) and 441b(a) by knowingly accepting excessive and prohibited contributions; (3) (4) take no further action with respect to The Media Fund and the DNC Services Corporation/Democratic National Committee and Andrew Tobias, in his official capacity as treasurer ("DNC") in connection with allegations that The Media Fund coordinated its expenditures to make excessive in-kind contributions to the DNC and/or John Kerry for President, Inc. and Robert A. Farmer, in his official capacity as treasurer ("Kerry Committee"); (5) find no reason to believe that the Kerry Committee violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), with respect to allegations that it received excessive in-kind contributions from The Media Fund; and (6) close the file with respect to the DNC and the Kerry Committee.

**II. BACKGROUND**

The Commission previously found reason to believe that The Media Fund ("TMF") violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, by knowingly accepting contributions in excess of \$5,000, and by knowingly accepting corporate and/or union contributions.<sup>2</sup> The ensuing investigation confirmed and uncovered additional evidence that TMF accepted over \$1,000 in contributions and made over \$1,000 in expenditures for the purpose of electing John Kerry and defeating George Bush in the 2004 Presidential election. The

---

<sup>2</sup>

1 investigation also confirmed that TMF satisfied the major purpose test and triggered political  
2 committee status as early as December 2003, but failed to register and report with the  
3 Commission, and subsequently accepted over \$45 million in excessive contributions and  
4 approximately \$9 million in contributions from prohibited sources. *See* GC Brief issued  
5 November 17, 2006 ("GC Brief") at 3, fn. 4.

6  
7 we issued the General Counsel's Brief, which is incorporated herein by reference.  
8 *See* GC Brief. In its response to the GC Brief, TMF argues that it was not a political committee,  
9 because the GC Brief seeks to retroactively apply 11 C.F.R. § 100.57 to solicitations made by  
10 TMF and TMF did not fund communications containing the so-called "magic words" of express  
11 advocacy. *See* Response Brief filed January 12, 2007 ("TMF Response"). TMF also cited to  
12 past enforcement matters to support the proposition that 11 C.F.R. § 100.22(b) express advocacy  
13 does not apply to communications made by TMF. *See id.* TMF further argues that application  
14 of the major purpose test is not appropriate because of its contention that it otherwise did not  
15 trigger political committee status.

16 After the Commission issued a Supplemental Explanation & Justification Regarding  
17 Political Committee Status in connection with its 2004 Rulemaking on Political Committee  
18 Status, TMF filed a short supplemental response and requested a Probable Cause Hearing before  
19 the Commission under the Probable Cause Hearing pilot program. *See* Supplemental Response  
20 filed February 20, 2007 ("Supplemental Response"). The Commission held a probable cause  
21 hearing in this matter on March 21, 2007. *See* Transcript of March 21, 2007 Probable Cause  
22 Hearing ("TMF Hearing").

27044181302

1 The factual record developed during the investigation shows that TMF raised and spent  
2 approximately \$60 million for federal political campaign activity, including disbursements for an  
3 advertising campaign in Presidential Election "battleground states" from March 2004 through  
4 Election Day 2004.<sup>3</sup> See GC Brief at 14-20. Moreover, TMF's solicitations to potential donors  
5 stated that its advertising campaigns were the cause of decreased public support for George Bush  
6 in these "battleground states" that would decide the election and made it clear that the funds  
7 received would be used to target the defeat of George Bush. See *id.* at 5-14. Further, a number  
8 of the TMF advertisements expressly advocated the election of John Kerry and/or the defeat of  
9 George Bush. See *id.* at 14-20.

10 Accordingly, for the reasons set forth in the GC Brief and discussed below, we  
11 recommend that the Commission find probable cause to believe that TMF violated 2 U.S.C. §§  
12 433 and 434 by failing to register as a political committee with the Commission and report its  
13 contributions and expenditures and violated 2 U.S.C. §§ 441a(f) and 441b(a) by knowingly  
14 accepting excessive and corporate contributions.

15 The Commission also found reason to believe that TMF violated 2 U.S.C. §§ 441a and  
16 434 by making and failing to report excessive in-kind contributions to the DNC and the Kerry  
17 Committee in the form of coordinated expenditures, and found reason to believe that the DNC  
18 violated 2 U.S.C. §§ 441a(f) and 434 by accepting and failing to report such excessive in-kind  
19 contributions from TMF.<sup>4</sup> The investigation leads us to conclude that there is no credible  
20 evidence of coordination in this matter. Accordingly, we recommend that the Commission take

---

<sup>3</sup> See TMF's IRS Forms 990 (2003 and 2004). As discussed further below, TMF has conducted only limited activities since the 2004 election. It raised an additional \$1,025,000 from January 2005 through December 2006, bringing its total contributions (for all years) to \$60,439,183.

<sup>4</sup> The Commission did not take any action at that time with respect to the coordination allegations against the Kerry Committee.

no further action as to TMF and the DNC with respect to allegations that TMF made in-kind contributions to the Kerry Committee and to the DNC, find no reason to believe the Kerry Committee received excessive, unreported in-kind contributions via coordinated expenditures, and close the file as to the DNC and the Kerry Committee.

**III. ANALYSIS**

**A. The Media Fund Failed to Register and Report as a Political Committee In Accordance with 2 U.S.C. §§ 433 and 434**

As set forth in the GC Brief, TMF triggered political committee status in two separate ways. First, TMF received "contributions" exceeding \$1,000 in response to multiple fundraising solicitations clearly indicating that funds received would be used to target the election or defeat of a specific candidate in the 2004 presidential election. Second, TMF made "expenditures" exceeding \$1,000 by financing advertisements expressly advocating the election or defeat of candidates for President in 2004. As a result of these contributions and expenditures, and because its major purpose was political campaign activity, TMF should have registered as a political committee, disclosed its receipts and disbursements to the public through reports filed with the Commission, and complied with the Act's contribution limits and prohibitions.

***1. The Media Fund Exceeded the \$1,000 Statutory Threshold by Receiving Contributions***

TMF does not dispute that it received more than \$1,000 in response to fundraising solicitations by TMF and its joint fundraising committee, Joint Victory Committee 2004 ("JVC"), in Attachments 3-5, or that these solicitations clearly indicated funds received would be

27044181304

1 targeted to the election or defeat of a clearly identified federal candidate.<sup>5</sup> Rather, TMF argues it  
2 was not required to register as a political committee because, under Commission regulations in  
3 place in 2003-2004, the language of the solicitations was irrelevant to determining whether the  
4 resulting funds were “contributions” under the Act. *See* TMF Response at 4-10. Specifically,  
5 TMF argues that the Commission must retroactively apply 11 C.F.R. § 100.57, which was not  
6 effective until January 1, 2005, to conclude that funds received in response to a communication  
7 indicating that “any portion of the funds received will be used to support or oppose a clearly  
8 identified Federal candidate” are “contributions” under the Act. *See* TMF Response at 4-5;  
9 Supplemental Response at 1-2. TMF further argues that funds received by an organization are  
10 not contributions under the Act unless the funds are used to make a contribution to a candidate or  
11 committee or to make an express advocacy expenditure. *See* TMF Hearing at 76:1-76:6.

12 The GC Brief does not rely on or cite Section 100.57 to conclude that TMF’s solicitations  
13 constitute contributions under the Act. Furthermore, TMF misstates the applicable law at the  
14 time of its solicitations. In enacting Section 100.57, the Commission codified the standards for  
15 communications that constitute contributions previously set forth in *FEC v. Survival Education*  
16 *Fund*, 65 F.3d 285, 295 (2d Cir. 1995). In the Explanation and Justification for 11 C.F.R. §  
17 100.57, the Commission noted that the standard outlined in Section 100.57 drew support from  
18 *Survival Education Fund*. *See Political Committee Status, Definition of Contribution, and*  
19 *Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 Fed. Reg. 68056,  
20 68057 (Nov. 23, 2004); *Supplemental Explanation & Justification Regarding Political*

<sup>5</sup> TMF received the majority of its funds through JVC. JVC has used “Victory Campaign 2004” to refer to both its federal and non-federal accounts in its FEC and IRS Filings. *See* GC Brief at 3, fn. 4. For the sake of convenience, we will refer to all accounts of this entity as “JVC,” unless otherwise noted.

1 *Committee Status*, 75 Fed. Reg. 5595, 5602 (Feb. 7, 2007). Thus while Section 100.57 was a  
2 “new rule” in that it was not in the Commission’s regulations before January 1, 2005, it is not  
3 materially different from the leading federal court interpretation of the statutory definition of  
4 “contribution” in effect when TMF made the solicitations at issue.

5 TMF’s argument that the funds received did not constitute “contributions” under *Survival*  
6 *Education Fund* unless the funds were used to make contributions to candidates or to make  
7 express advocacy expenditures, *See* TMF Response at 5-7, misapprehends *Survival Education*  
8 *Fund* and is inconsistent with the Commission’s interpretation of that opinion in other matters.<sup>6</sup>

9 As discussed in the GC Brief, the 2<sup>nd</sup> Circuit considered whether a solicitation sought  
10 “contributions” and, was subject to disclaimer requirements under 2 U.S.C. § 441d(a), stating,

11 Even if a communication does not itself constitute express  
12 advocacy, it may still fall within the reach of § 441d(a) *if it*  
13 *contains solicitations clearly indicating that the contributions will*  
14 *be targeted to the election or defeat of a clearly identified*  
15 *candidate for federal office....* Only if the solicitation makes plain  
16 that the contributions will be used to advocate the defeat or success  
17 of a clearly identified candidate at the polls are they obliged to  
18 disclose that the solicitation was authorized by a candidate or his  
19 committee.

20 *See* GC Brief at 5-7 (*citing* 65 F.3d at 295)(emphasis added). Citing the mailer’s statement,

21 “Your special election-year contribution will help us communicate your views to the hundreds of  
22

<sup>6</sup> The Commission relied, in part, upon an application of *Survival Education Fund* in finding probable cause to believe and ultimately filing suit against Club for Growth for failing to register and report as a political committee. *See* General Counsel’s Report #2 in MUR 5365 (Club for Growth); Complaint, *FEC v. Club for Growth, Inc.*, No. 1:05-cv-01851-RMU (D.D.C. filed Sept. 19, 2005). Recently, the Commission also relied, in part, upon an application of *Survival Education Fund* in finding reason to believe that several 527 organizations active in the 2004 election cycle violated the Act by failing to register with the Commission as political committees and file disclosure reports. *See* Commission Certifications approving Factual and Legal Analyses and/or Proposed Conciliation Agreements in MUR 5753 (League of Conservation Voters) (July 18, 2006); MUR 5752 (Environment2004 Action Fund and Environment2004, Inc.) (July 18, 2006); MUR 5754 (MoveOn.org Voter Fund) (July 19, 2006); MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth) (July 19, 2006); MUR 5487 (Progress for America Voter Fund) (July 19, 2006).



1 thousands of members of the *voting public*, letting them know why Ronald Reagan and his anti-  
2 people policies *must* be stopped,” the court held that the mailer was a solicitation of  
3 contributions, concluding that this statement “leaves no doubt that the funds contributed would  
4 be used to advocate Reagan’s defeat at the polls, not simply to criticize his policies during an  
5 election year.” 65 F.3d at 295 (emphasis in original). Under *SEF*, the relevant analysis is  
6 whether the solicitation indicates the funds solicited would be used to target the election or  
7 defeat of a clearly identified federal candidate. Whether the solicitation indicates that the funds  
8 received will be used for express advocacy, and whether such funds are actually used for express  
9 advocacy, does not determine whether the funds solicited result in a contribution under *SEF*.

10 TMF’s argument that the use of the funds determines whether an organization has  
11 accepted a contribution under the Act would effectively eliminate the contribution aspect of  
12 determining political committee status. *See* TMF Hearing 74:5-77:7. If a receipt is not  
13 considered a contribution until expended for express advocacy purposes, then the \$1,000  
14 contribution requirement would no longer serve as an independent basis for establishing political  
15 committee status. Furthermore, under TMF’s analysis, an organization would not be able to  
16 determine if funds received constitute a contribution until after the funds are expended for either  
17 direct contributions or for express advocacy disbursements, making it impossible to fulfill the  
18 disclosure requirements under the Act. In short, there is no basis for TMF’s proposed  
19 construction of the term “contribution” and neither the courts nor the Commission have adopted  
20 such a statutory construction.

21 a. The Media Fund’s Direct Solicitations Resulted in “Contributions”

22 All of the direct solicitations by TMF cited in the GC Brief make it clear that TMF  
23 intended to use the funds it received to target the election of John Kerry and/or the defeat of  
24

1 George Bush in the upcoming election. *See* GC Brief at 7-11. TMF's direct solicitations were  
2 intended to counter "the Bush onslaught" of "enormous financial resources."

3 From its inception to the end of 2004, TMF received almost \$15 million directly  
4 from donors.<sup>7</sup>

5 In numerous fundraising presentations, letters and e-mails, TMF clearly explained to  
6 potential contributors that their funds would be used to target the election of John Kerry and/or  
7 the defeat of George Bush. For example, fundraising presentations by TMF's President, Harold  
8 Ickes, included Powerpoint slides with messages such as "Bush can be beaten" and "The Media  
9 Fund: 17 states media plan; Timed to counter Bush onslaught ... Will challenge Bush: trust,  
10 competence, economy and other issues ...." , *see also* GC

11 Brief at 7-8. In solicitations sent directly to potential donors, TMF highlighted the effectiveness  
12 of specific ads, as well as its overall advertising efforts, in reducing public support for Bush and  
13 increasing public support for Kerry. *See* GC Brief at 9-11. An October 2004 email soliciting  
14 \$25,000 to be used for TMF's "new Saudi ad campaign project" noted that before the TMF ads  
15 ran in St. Louis "Kerry trailed Bush by 1 point," but after the ads ran, "Kerry led Bush by 9  
16 points ... " concluding with the statement that TMF believes "this message can and will make the  
17 crucial difference."

18  

---

<sup>7</sup> TMF did not keep fundraising records of whether it received donations in response to particular solicitations. Nevertheless, as described in the GC Brief, it is clear from the documents produced in this matter (including emails and letters) that some donors gave funds to TMF in response to the specific solicitations. *See* GC Brief at 7-11; Attachments 3-5.

b. Joint Fundraising Committee Solicitations on Behalf of  
The Media Fund Resulted in "Contributions"

TMF also received over \$44 million through its joint fundraising committee, Joint Victory Campaign 2004 ("JVC").<sup>8</sup> See GC Brief at 10, fn. 10. TMF argues that the fundraising regulations do not place a "restriction" on the content of a joint fundraising solicitation and incorporates its previous arguments suggesting that, prior to the enactment of Section 100.57, a joint fundraising committee was permitted to raise prohibited sums on behalf of a non-federal entity. See TMF Response at 8-10.

The fundraising efforts of JVC, like the solicitations made exclusively on behalf of TMF, identified the presidential candidates and indicated that the funds would be used to elect or defeat these candidates, thereby resulting in contributions. Such fundraising documents indicated that the funds would be used to support TMF's media campaign and contained messages such as:

**"Victory Campaign 2004** [the combined efforts of ACT's door-to-door canvassing and TMF's media campaign]... will provide creative, highly targeted media focused on Democratic base and persuadable swing voters in the battleground states ... It will define the issues, expose the Bush record and ensure that the Democrats are highly competitive."  
(Attachment 3 at 3).

Additional solicitations by JVC also reflect TMF's emphasis on raising funds to "compete with

---

<sup>8</sup> Under the Joint Fundraising Agreement that established JVC, the participants (TMF and America Coming Together ("ACT")) agreed that the first \$5,000 of any donation from any individual, partnership, or federally registered political committee would go to ACT. "Amendment to Joint Fundraising Agreement" (Nov. 14, 2003)

The remainder of any such donations, and all other donations, then would be split between TMF and ACT. *Id.* Furthermore, the first \$5,000 of each donation to ACT would go to ACT's federal account. *Id.* All non-federal donations to ACT, including any portion of a donation that would cause the donor to exceed applicable contribution limits, would go to ACT's non-federal account. *Id.* Also, a donor could specify the portion of his donation that should go to TMF and/or ACT. *Id.* JVC did not keep fundraising records indicating whether donations were received in response to particular solicitations.

1 the staggering financial resources of the Bush campaign.”  
2 (Attachment 5). Other solicitations sought to highlight the effectiveness of TMF's media  
3 programs by including polling data showing Kerry moving closer to Bush in “battleground  
4 states.” See GC Brief at 13-14. These messages, along with JVC solicitations described in the  
5 GC Brief, demonstrate that “the White House – the presidency was of considerable interest to  
6 donors ....” see also GC Brief at 12-13.

7 Each of the solicitations discussed in the GC Brief clearly indicate that the funds received  
8 by TMF would be targeted to defeat George Bush and elect John Kerry in the 2004 election. See  
9 GC Brief at 10-13. The funds raised through JVC were dedicated to an integrated effort by TMF  
10 and ACT to target the election or defeat of the same federal candidates, and did not target  
11 specific non-federal candidates. Accordingly, JVC's status as a joint fundraising committee does  
12 not affect the conclusion under *Survival Education Fund* that funds received in response to a  
13 communication that clearly indicates that the funds received will be targeted to the election or  
14 defeat of a clearly identified federal candidates are “contributions” that trigger political  
15 committee status. Furthermore, TMF cannot direct JVC to accept “contributions” on its behalf  
16 that it could not solicit directly. See 11 C.F.R. § 102.17(c)(5).

17 2. *The Media Fund Exceeded the \$1,000 Statutory Threshold by*  
18 *Making Expenditures*

19 As discussed in the GC Brief, TMF financed numerous mailers that constitute express  
20 advocacy under either 11 C.F.R. § 100.22(a) or (b). See Examples of TMF advertisements at  
21  
22

Attachment 6; GC Brief at 15-20.<sup>9</sup> TMF made expenditures of substantially more than \$1,000 for each of the six advertisements containing express advocacy discussed in the GC Brief.<sup>10</sup>

a. Express Advocacy Under 11 C.F.R. §§ 100.22(a) and 100.22(b) Extends Beyond "Magic Words"

The Commission defines express advocacy at 11 C.F.R. §§ 100.22(a) and 100.22(b). Section 100.22(a) provides that a communication "expressly advocates" the election or defeat of a candidate if it "uses phrases such as ... 'vote Pro-Life,' or 'vote Pro-Choice' accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice," or uses campaign slogans or individual words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" See 11 C.F.R. § 100.22(a); see also *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986)

<sup>9</sup> TMF contends that none of its communications were express advocacy, and that some of the communications were electioneering communications because they fell within the electioneering communications time period. See TMF Hearing at 59:15-59:19. TMF, however, acknowledges that communications containing express advocacy are excluded from the provisions of the Act governing electioneering communications. See *id.* at 58:12-59:14. The GC Brief included all of the TMF ads that we believe contain express advocacy under 11 C.F.R. § 100.22(a) and the strongest examples of what we believe contain express advocacy under 11 C.F.R. § 100.22(b). The GC Brief does not discuss a number of ads that could be described as duplicative of those mentioned in the Brief. In particular, there are multiple mailers, of which the example we included is representative, praising Kerry's Vietnam war record in terms of his personal character, accomplishments and qualifications. Similarly, there are broadcast communications, of which the ones we included are representative, contrasting Kerry's and Bush's positions, but that end with a slightly different call to action, using phrases like "Don't keep getting played" or "What are you going to do about it" or "Wouldn't it be good to have someone on our side" rather than "You better wake up before you get taken out".

<sup>10</sup> TMF has produced information indicating that the printing costs for one of the three mailers discussed in the GC Brief was \$66,400. Based on this cost, it is certain that each of the other two mailers discussed in the GC report cost over \$1,000 each to print and mail. TMF's electioneering communications reports indicate that it spent approximately \$116,763 on "Stand Up," one of the television advertisements discussed in the GC Brief. See FEC Form 9 at 52 of Schedule 9-B (covering period Sept. 29 – Oct. 4, 2004) (one of two ads cited) and FEC Form 9 at 128 of Schedule 9-B (covering period Oct. 5-11, 2004) (one of six ads cited). TMF's reports do not indicate the costs for the ad "First Priority," the other television ad discussed in the GC Brief, and it has not been able to provide us with details of the costs of that particular ad. Nevertheless, based on the costs of "Stand Up," it is certain that TMF spent more than \$1,000 in producing and airing "First Priority." Finally, TMF reports that it spent \$22,622 on the radio advertisement discussed in the GC brief. See FEC Form 9 at 1-4 of Schedule 9-B (covering period Oct. 27-28, 2004).

1 (“MCFL”). Courts have held that “express advocacy also includes verbs that exhort one to  
2 campaign for, or contribute to, a clearly identified candidate.” *FEC v. Christian Coalition*, 52 F.  
3 Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley v. Valeo*, 424 U.S. 1, 44, n.52 (1976),  
4 included the word “support,” in addition to “vote for” or “elect,” on its list of examples of  
5 express advocacy communication).

6 Section 100.22(b) provides that express advocacy also includes communications that,  
7 when taken as a whole or with limited reference to external events, “could only be interpreted by  
8 a reasonable person as containing advocacy of the election or defeat of one or more clearly  
9 identified candidate(s)” when (1) it contains an “electoral portion” that is “unmistakable,  
10 unambiguous, and suggestive of only one meaning;” and (2) “[r]easonable minds could not differ  
11 as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s)  
12 or encourages some other kind of action.” 11 C.F.R. § 100.22(b). In its discussion of then  
13 newly-promulgated Section 100.22(b), the Commission stated that “communications discussing  
14 or commenting on a candidate’s character, qualifications or accomplishments are considered  
15 express advocacy under new section 100.22(b) if, in context, they have no other reasonable  
16 meaning than to encourage actions to select or defeat the candidate in question.” *Express*  
17 *Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed.  
18 Reg. 35292, 35295 (July 6, 1995).

19 TMF argues that its communications do not constitute express advocacy under 11 C.F.R.  
20 § 100.22(a) because the communications do not explicitly urge any specific action “to elect,  
21 vote, or defeat a candidate” or include an “exhortation to take action related to the election.”  
22 TMF Response at 11; TMF Hearing at 26:8-26:9. TMF also notes that *McConnell v. FEC*, 540  
23 U.S. 93 (2002) (“*McConnell*”), contains instances where the Court refers to “magic words” when

1 discussing express advocacy and, on that basis, argues that *McConnell* reaffirmed the holdings of  
2 *Buckley* and *MCFL* that express advocacy is limited to so-called “magic words.” TMF Response  
3 at 17-18.

4 TMF misconstrues *Buckley*, *MCFL*, and *McConnell*, as none of those cases stands for the  
5 proposition that express advocacy must be limited to a finite set of “magic words” set forth as  
6 examples in 11 C.F.R. § 100.22(a). In *Buckley*, the Court prefaced its list of examples with the  
7 phrase “such as,” demonstrating that the list is non-exhaustive. 424 U.S. at n. 51. In *MCFL*, the  
8 Court made clear that it did not intend wooden literalism to define express advocacy. Instead the  
9 Court stated that advocacy could be “marginally less direct” than “Vote for Smith,” as long as its  
10 “essential nature was clear. 479 U.S. at 249. In *McConnell*, the Court explicitly stated that  
11 *Buckley* provided only “examples of express advocacy.” 540 U.S. at 191 (emphasis added)  
12 (internal citations omitted).<sup>11</sup>

13 TMF also argues that its communications do not constitute “express advocacy” under  
14 11 C.F.R. § 100.22(b) because that provision, and the case it is based on, *FEC v. Furgatch*, 807  
15 F.2d 857 (9th Cir. 1987), is invalid and inconsistent with *Buckley*, *MCFL*, and *McConnell*.  
16 Although TMF points to prior court decisions that held that the Commission could not apply the  
17 *Furgatch* test for express advocacy as codified in Section 100.22(b), these decisions rested in  
18 part on a mistaken belief that the First Amendment prevented any regulation of speech beyond

<sup>11</sup> No court since *McConnell* has attempted to define the contours of express advocacy with any greater refinement. See, e.g. *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773 (9th Cir. 2006), *Center for Individual Freedom v. Carmouche*, 449 F.3d 655 (5th Cir. 2006); *American Civil Liberties Union v. Heller*, 378 F.3d 979 (9th Cir. 2004); *Anderson v. Spear*, 356 F.3d 651, 664-65 (6th Cir. 2004); *Colorado Right to Life Comm. v. Davidson*, 395 F.Supp.2d 1001 (D. Colo. 2005); *North Carolina Right to Life v. Leake*, 2007 W.L. 987788 (E.D.N.C. 2007). Courts examining the constitutionality of state election laws that regulated speech beyond express advocacy have recognized the continued validity of express advocacy as a narrowing construction to cure an otherwise vague or overbroad statute. See *Heller*, 378 F.3d at 985 (declining to take a position on the differing interpretations of express advocacy); *Anderson*, 356 F.3d at 665 (applying express advocacy as a narrowing construction to a Kentucky statute regulating electioneering near a polling place); *Carmouche*, 449 F.3d at 665 (applying express advocacy as a limiting construction to a statute requiring disclosure of certain expenditures and stating that it “adopt[s] *Buckley*’s definition of what qualifies as such advocacy”).

1 magic words. *See, e.g., Virginia Society for Human Life v. FEC*, 263 F.3d 379 (4th Cir. 2001)  
2 (reasoning that the Supreme Court in *Buckley* and *MCFL* made a crucial constitutional  
3 distinction between express advocacy and issue advocacy); *see also Maine Right to Life v. FEC*,  
4 914 F. Supp. 8, 12 (D. Maine 1996), *aff'd*, 98 F.3d 1 (1st Cir. 1996). *McConnell*, of course,  
5 corrected this misconception. *See McConnell*, 540 U.S. at 190-91, 124 S.Ct. at 687.

6 TMF's argument that the Commission should not rely on its own regulations at Section  
7 100.22(b) is contrary to established precedent that "it is elementary that an agency must adhere  
8 to its own rules and regulations." *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986). As  
9 the D.C. Circuit has stated, the Commission's unwillingness to enforce its own regulations would  
10 in itself "establish that such agency action was contrary to law" in a suit under 2 U.S.C.  
11 § 437g(a)(8). *See Chamber of Commerce v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995). Thus, the  
12 Commission must apply Section 100.22(b) to the facts of this matter.

13 Prior to TMF's disbursements for express advocacy communications in 2004, the  
14 Commission repeatedly provided public notice that it intended to apply the regulation in all  
15 jurisdictions in which enforcement of Section 100.22(b) was not precluded by court decisions.<sup>12</sup>  
16 The Commission's statements regarding the validity of Section 100.22(b) were available to TMF  
17 prior to its disbursements for express advocacy communications in 2003 and 2004. Despite  
18 TMF's interpretation of Section 100.22(b), which was contrary to the Commission's public  
19 statements, TMF did not request an Advisory Opinion from the Commission to clarify whether  
20 its activities were permissible under the Act.

<sup>12</sup> First, the Commission refused to initiate a requested rulemaking to repeal that Section 100.22(b). *See* 63 Fed. Reg. 8363 (Feb. 19, 1998). In doing so, the Commission stated that "the primary reason for the Commission's decision not to open a rulemaking [to repeal Section 100.22(b)] is its continued belief that the regulation is constitutional." *Id.* at 8364. Second, the Commission successfully persuaded the Fourth Circuit to vacate a nationwide permanent injunction on enforcing that regulation. *See VSHL*, 263 F.3d at 392-93. Third, the Commission issued a policy statement that it would forbear from applying Section 100.22(b) only in the First and Fourth Circuits. *See Policy Regarding Express Advocacy*, adopted Sept. 22, 1999.



b. The Media Fund's Communications Contain Express Advocacy

TMF argues that its communications do not contain express advocacy under either Section 100.22(a) or 100.22(b) and are distinguishable from ads that the Commission has found to contain express advocacy. *See* TMF Response at 10-13 and Supplemental Response at 3. The recent settlements with other 527 organizations active during the 2004 election cycle, however, include communications very similar to those made by TMF that the Commission found constitute express advocacy under 11 C.F.R § 100.22(b). *See* MUR 5753 (League of Conservation Voters); MUR 5754 (MoveOn.org Voter Fund); MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth); MUR 5487 (Progress for America Voter Fund).

All of TMF's communications discussed in the GC Brief contain express advocacy under Section 100.22(b) because they are unmistakably electoral and reasonable minds could not differ as to whether they encourage actions to elect or defeat the clearly identified candidate. *See* Attachment 6. Furthermore, two of TMF's mailers, the "Education Mailer" and the "Health Care Mailer" also contain express advocacy under Section 100.22(a) because they refer to the "need" or the "choice" of a particular kind of President, followed by the clear identification of John Kerry as that type of candidate. By spending more than \$1,000 for communications expressly advocating the election or defeat of a federal candidate, TMF made sufficient "expenditures" to satisfy the requirements for political committee status. *See* Analysis of TMF advertisements, GC Brief at 15-20.

3. *The Media Fund's Major Purpose was Federal Campaign Activity*

The Supreme Court has held that "[t]o fulfill the purposes of the Act" and avoid "reach[ing] groups engaged purely in issue discussion," only organizations whose major purpose

1 is campaign activity can be considered political committees under the Act. *See, e.g., Buckley*,  
2 424 U.S. at 79; *MCFL*, 479 U.S. at 262.

3 An organization's "major purpose" may be established through public statements of  
4 purpose. *See, e.g., FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (finding that  
5 the organization evidenced its "major purpose" through its own materials which stated the  
6 organization's goal of supporting the election of Republican Party candidates for federal office  
7 and through efforts to get prospective donors to consider supporting federal candidates); *FEC v.*  
8 *GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("organization's [major] purpose may be  
9 evidenced by its public statements of its purpose or by other means").

10 An organization can also satisfy *Buckley's* "major purpose" test through sufficient  
11 spending on campaign activity. *MCFL*, 479 U.S. at 262-264 (political committee status would  
12 be conferred on MCFL if its independent spending were to become so extensive that the group's  
13 major purpose may be regarded as campaign activity); *see also Richey v. Tyson*, 120 F. Supp. 2d  
14 1298, 1310, n.11 (S.D. Ala. 2002) ("As a threshold matter, the plaintiffs inaccurately describe  
15 the activity to which the major purpose inquiry relates. The plaintiffs describe the relevant major  
16 purpose as one to 'expressly advocate' a particular election result, while the Supreme Court has  
17 described the relevant major purpose (under FECA) as 'the nomination or election of a  
18 candidate,' or simply 'campaign activity,' terms that comfortably reach beyond explicit  
19 directions to vote a particular way.").

20 TMF plainly satisfies the major purpose test set forth in *Buckley*. TMF spent  
21 \$53,389,856 – or more than 92% of its reported disbursements during the 2004 election cycle –  
22 for advertisements and direct mail pieces that supported or attacked clearly identified federal  
23 candidates, John Kerry and George Bush, respectively. *See GC Brief at 14-20*. The vast

1 majority of TMF's television, radio and print advertisements during the 2004 election cycle  
2 mention George Bush or John Kerry, and none of TMF's advertisements during that time period  
3 mention any candidates other than the presidential and vice presidential candidates in the 2004  
4 general election. TMF's solicitations also indicate that it presented itself to donors as a  
5 destination for "soft money" that could be used to help the Democratic Presidential nominee.  
6 *See id.* at 22. As described in detail above, TMF's fundraising efforts discussed TMF's "interest  
7 in changing occupants in the White House." Furthermore, TMF focused  
8 its advertisements on "17 key states," that "will decide who takes the oath of  
9 office for President in January 2005." TMF's self-proclaimed goal  
10 in producing and running these advertisements was to decrease public support for Bush and  
11 increase public support for Kerry. *See* GC Brief at 23-24, n.22. This evidence establishes that  
12 TMF's major purpose was federal campaign activity, specifically electing John Kerry and  
13 defeating George Bush.

14 TMF significantly curtailed its operations after the November 2004 presidential election.  
15 Since January 1, 2005, TMF has raised over \$1 million and spent approximately \$1.4 million,  
16 including over \$1 million in donations to other organizations, far less than the approximately \$60  
17 million that it raised and spent during the 2004 election.<sup>13</sup> During that time period, TMF  
18

<sup>13</sup> Among its largest disbursements since January 2005, TMF donated \$850,000 to ACT, \$50,000 to America Votes, Inc., a 527 organization that served as an umbrella organization or clearinghouse for a coalition of almost 30 national organizations that collaborated to mobilize voters in the 2004 elections, and \$135,000 to the September Funds, a 527 organization that raised funds to assist Democrats in the November 2006 elections. *See* IRS Forms 8872 for 2005 and 2006; *see also* John M. Broder, *Democrats Form New Group for Fund-Raising and Ads*, N.Y. Times, Sept 14, 2005.

1 reported engaging in limited federal campaign activity in connection with two electioneering  
2 communications in Senate races in Missouri and Virginia during the November 2006 election.<sup>14</sup>

3 TMF argues that application of the major purpose test is not appropriate since it contends  
4 that it did not make any contributions to Federal candidates or make express advocacy  
5 expenditures. *See* TMF Response at 22-28. TMF's argument is premised on an incorrect  
6 reading of the Act. The Act defines a "political committee" as any committee, club, association,  
7 or other group of persons that receives "contributions" or makes "expenditures" which aggregate  
8 in excess of \$1,000 during a calendar year. *See* 2 U.S.C. § 431(4)(A). As discussed above, TMF  
9 triggered the statutory threshold for political committee status by both receiving more than  
10 \$1,000 in "contributions" and making more than \$1,000 in "expenditures." After triggering  
11 either the contribution or expenditure threshold for political committee status, the Commission  
12 then looks to whether an organization has a major purpose consistent with being a political  
13 committee. Based on TMF's statements of purpose and its disbursements for campaign activity  
14 in connection with the 2004 presidential election, it is clear that TMF had the major purpose of  
15 engaging in federal campaign activity.

16 At its Probable Cause Hearing, TMF also argued that to establish the major purpose of an  
17 organization, the Commission should consider the ratio of express advocacy expenditures to  
18 other expenditures. *See* TMF Hearing at 19:2-19:24. TMF misconstrues both *MCFL* and  
19 *GOPAC*, decisions which made it clear that other types of "campaign activity" on behalf of a  
20 clearly identified federal candidate would be relevant to establishing major purpose. *See MCFL*,

---

<sup>14</sup> TMF reported disbursements totaling \$198,125 in connection with the placement and production of two television ads on October 27, 2006 that clearly identified two federal candidates, George Allen and Jim Talent. *See* TMF FEC Form 9 (Electioneering Communications), filed on October 27, 2006. TMF also continued to make disbursements characterized as "media consulting," and it reportedly engaged in limited voter contact activities in connection with the Virginia gubernatorial campaign in the fall of 2005. *See id.*; *see* Chris Cillizza and Shailagh Murray, *Virginia Governor's Race to be an Experiment in Voter Turnout*, The Washington Post, Sept. 18, 2005, at A5.

479 U.S. at 262; *GOPAC*, 917 F. Supp. at 859. TMF's interpretation of the major purpose test would effectively render irrelevant the \$1,000 contribution and \$1,000 expenditure thresholds required for establishing political committee status. TMF's proposed major purpose analysis would collapse the assessment of an organization's political committee status into a single question – whether an organization spent more than 51% of its disbursements for express advocacy communications, where express advocacy is limited to the use of “magic words” under 11 C.F.R. § 100.22(a). Such an assessment is contrary to longstanding jurisprudence on major purpose and to the Commission's application of the major purpose test. *See, e.g.*, MUR 5753 (League of Conservation Voters), MUR 5754 (MoveOn.org Voter Fund); MURs 5511 & 5525 (Swift Boat Veterans and POWs for Truth); MUR 5487 (Progress for America Voter Fund).

#### 4. Conclusion

Accordingly, as discussed above, TMF, exceeded the threshold for political committee status set forth in 2 U.S.C. § 431(4) by receiving over \$1,000 in contributions in response to fundraising solicitations clearly indicating that the funds received would be targeted to the election or defeat of a clearly identified federal candidate and by making over \$1,000 in expenditures for express advocacy communications. Therefore, because TMF also had the major purpose of federal campaign activity, we recommend that the Commission find probable cause to believe that The Media Fund violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and disclose its receipts and disbursements to the public through reports filed with the Commission.

**B. The Media Fund Knowingly Accepted Excessive and Prohibited Contributions in Violation of 2 U.S.C. §§ 441a(f) and 441b(a)**

As a political committee, TMF should have complied with the Act's contribution limits and source restrictions. *See* 2 U.S.C. §§ 441a and 441b(a). TMF, however, accepted over \$45 million in individual contributions in excess of \$5,000. These excessive contributions included contributions from eight individuals who each gave in excess of \$1 million to TMF (or to its joint fundraising committee, JVC).<sup>15</sup> TMF also accepted over \$9 million in contributions from prohibited sources, most of which were labor organizations. *See* Attachment 2 at 2. Accordingly, we recommend that the Commission find probable cause to believe that The Media Fund violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of \$5,000 and 2 U.S.C. § 441b(a) by knowingly accepting contributions from prohibited sources.

**C. Coordination**

The Commission previously found reason to believe that TMF made excessive contributions in the form of coordinated expenditures to the Kerry Committee and to the DNC. The finding of possible coordination with the Kerry Committee was based on the role of Jim Jordan, who served as the campaign manager of the Kerry Committee until November 2003 and then subsequently worked for TMF. The finding of possible coordination with the DNC was based on Harold Ickes's role on the Executive Committee of the DNC during the time that he served as president of TMF. Following receipt of the Complaint, TMF denied the coordination allegations, but initially did not provide sufficient information to resolve the questions

<sup>15</sup> These donors gave either to TMF or to JVC: Peter Lewis - \$14.05 million to JVC; George Soros - \$12.05 million to JVC; Steve Bing - \$9.99 million to JVC; Ted Waitt - \$5 million to JVC; Jonathan McHale - \$1.8 million to TMF; Joseph M. Field - \$1.575 million to TMF; and Christine L. Mattso - \$1.2 million to TMF; and Agnes Varis - \$1.155 million to JVC.

1 concerning the roles of Mr. Jordan and Mr. Ickes. *See* Response to Complaint of TMF and Mr.  
2 Ickes at 8-16 (May 18, 2004).

3 Our investigation has now produced substantial information about the roles of both  
4 individuals, but has produced no credible evidence that any coordination occurred. We therefore  
5 recommend that the Commission take no further action with respect to allegations that TMF  
6 made, or that the DNC accepted, excessive in-kind contributions in the form of coordinated  
7 expenditures and find no reason to believe that the Kerry Committee accepted excessive in-kind  
8 contributions in the form of coordinated expenditures.

9 *1. Jim Jordan's Activity Did Not Result in Coordination between The Media*  
10 *Fund and the Kerry Committee*

11  
12 Jim Jordan's work for the Kerry Committee in 2003 and his work for TMF in 2004 raised  
13 questions that some of TMF's communications may have been coordinated with the Kerry  
14 Committee based on the "former employee" conduct standard. *See* 11 C.F.R. § 109.21(d)(5)  
15 (2004). Satisfaction of this standard would require that: (1) Mr. Jordan used or conveyed to  
16 TMF information about the Kerry Committee's "campaign plans, projects, activities, or needs"  
17 (or information used by Mr. Jordan in providing services to the Kerry Committee); and (2) the  
18 information was "material to the creation, production, or distribution of" one of TMF's  
19 communications. *See* 11 C.F.R. § 109.21(d)(5)(ii) (2004). However, the facts do not support  
20 this conclusion.

21 First, Mr. Jordan's employment with the Kerry Committee was terminated on November  
22 9, 2003, which was before any primary election or caucus, and four months before TMF aired its  
23

1 first ad in connection with the November general election.<sup>16</sup> Mr. Jordan  
2 states that he was aware of the Kerry Committee's plans, projects, activities, and needs only  
3 before November 9, 2003—at a time when the campaign was solely focused on winning the  
4 January 2004 Iowa caucus and New Hampshire primary.

5 Mr. Jordan states that, during his tenure, the Kerry Committee did not  
6 “undertake planning for either the general election or for the phases of the primary campaign  
7 after Sen. Kerry became the putative nominee due to victories he would have to achieve in the  
8 early primaries....” Moreover, it was only on the day that John Kerry dismissed him  
9 that Mr. Jordan first learned of the candidate's intention to forego federal matching funds, a  
10 decision upon which none of the campaign's strategy had been based.

11 Second, Mr. Jordan had no direct involvement in TMF's ad campaign. He began  
12 working for TMF in January 2004, serving as press spokesman and focusing primarily on  
13 communications with the media and research support. However, Mr. Jordan did  
14 not develop the ideas or write the scripts for television, radio, or direct mail public  
15 communications. While Mr. Jordan was not isolated from the creation of  
16 TMF ads by any sort of “ethics wall,” the investigation revealed no evidence that any informal  
17 conversations or occasional comments he might have provided resulted in changes to TMF's ads.  
18 *Id.*

19 Finally, based on a review of Kerry Committee and TMF documents, as well as  
20 Mr. Jordan's own testimony, there is no evidence that Mr. Jordan transmitted to TMF  
21 information about the Kerry Committee's plans, projects, activities, or needs that was material to

<sup>16</sup> The Commission recently reduced the temporal limit in the former employee conduct standard from the current election cycle to 120 days. 11 C.F.R. § 109.21(d)(5)(i) (2006); see *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,204-5 (June 8, 2006) (“both national and local events tend to render campaign plans and strategy obsolete on a very rapid basis”).



1 the creation of any TMF ads. Both his sworn statement and our interview with Mr. Jordan  
2 revealed no evidence that any such transmittals occurred. Moreover,  
3 documents and discovery responses from TMF and the Kerry Committee provided no evidence  
4 that Mr. Jordan ever transmitted or used information from the Kerry Committee that was  
5 material to TMF's communications.<sup>17</sup>

6 In summary, our investigation reveals that Mr. Jordan lacked relevant information about  
7 the Kerry Committee's plans, was not directly involved in TMF's ad campaign, and does not  
8 appear to have conveyed any material information to TMF regarding the Kerry Committee's  
9 plans, projects, activities, or needs. These facts lead to the conclusion that the "former  
10 employee" conduct standard is not satisfied. See 11 C.F.R. § 109.21(d)(5)(ii) (2004). Therefore,  
11 our investigation does not support a conclusion that TMF made coordinated communications  
12 based on Mr. Jordan's activity. Accordingly, we recommend that the Commission take no  
13 further action as to TMF, and find no reason to believe that the John Kerry for President, Inc. and  
14 Robert A. Farmer, in his official capacity as treasurer, violated the Act, with respect to  
15 allegations that TMF made excessive in-kind contributions to the Kerry Committee via  
16 coordinated expenditures

<sup>17</sup> In our analysis of all issues in this matter (*i.e.*, political committee status and coordination), we have reviewed over 11,000 pages of documents from TMF, TMF's consultant, the Kerry Committee, and ACT (where Mr. Jordan also provided services). While three documents revealed instances where Mr. Jordan expressed general knowledge of the Kerry Committee's activities, none of these instances is connected to any TMF communication.

(e-mail from Mr. Jordan noting that, as the Kerry Committee campaign manager, he received advice about Cuban policy issues); (e-mail from Mr. Jordan noting that any advice from Ralph Nader to John Kerry would have no influence on the latter); and (e-mail from Mr. Jordan speculating about the Kerry Committee's media purchases in several states in September 2004). Furthermore, there is no evidence of substantive contacts between Mr. Jordan and the Kerry Committee after his dismissal.

2. *Harold Ickes's Activity Did Not Result in Coordination between The Media Fund and the DNC*

Harold Ickes's contemporaneous involvement with both the DNC and TMF raised the question that some of TMF's communications may have been coordinated with the DNC, based on the "material involvement," "request or suggestion," or "substantial discussion" conduct standards. However, the evidence obtained in our investigation does not support a theory of coordination based on the conduct of Mr. Ickes.

Mr. Ickes has served the DNC in both formal and informal ways. Since 2001 he has served on its Executive Committee, which is responsible for the "conduct of the affairs" of the DNC.<sup>18</sup> Since the mid-1990's, Mr. Ickes has served on its Rules and Bylaws Committee, which is responsible for "receiv[ing] and consider[ing] all recommendations for adoption and amendments to" the rules and bylaws of the DNC and to the Charter of the Democratic Party. Charter at 16. Mr. Ickes also informally consulted with the DNC on special projects.

One of these special projects included a review of how the then-pending BCRA legislation would affect the structure and management of the DNC.

Notwithstanding his other roles, Mr. Ickes was never involved in the DNC's efforts to create or produce its own advertising in 2003-2004.

Furthermore, it appears, from Mr. Ickes's testimony and the documents produced in this matter, that he did not seek or obtain any material information about such efforts.

<sup>18</sup> See The Charter & The Bylaws of the Democratic Party of the United States ("Charter") at 5 (Jan. 19, 2002). Mr. Ickes stated that it was "unclear to [him] whatever happens to" the Executive Committee's advice about the direction of the DNC. *Id.* at 12:4-7. The Executive Committee met nine times from 2003 through the November 2004 election. Five of these meetings were formal ones (Feb. 21, June 20, and Oct. 3, 2003, and Mar. 26 and June 25, 2004), for which transcripts exist and were produced.

1 Our investigation did not show coordination based on Mr. Ickes's conduct. As founder  
2 and president of TMF, Mr. Ickes directed that organization's overall efforts to produce dozens of  
3 television, radio, and print advertisements. However, in his roles  
4 at the DNC, Mr. Ickes was not involved in that organization's communications.

5 Moreover, the documentary evidence and  
6 deposition testimony of Mr. Ickes demonstrate that the content and placement (*i.e.*, broadcast  
7 markets, timing, frequency or duration) of TMF's ads were in no way influenced by the DNC.  
8 Significantly, the only way that TMF learned of the DNC's media purchases was by hiring a  
9 media consulting firm to summarize the media purchases of the national party committees  
10 (including the DNC), the presidential candidate committees, and other organizations.

11 Accordingly, there is no basis to conclude that TMF made coordinated  
12 communications based on the "material involvement" conduct standard under section  
13 109.21(d)(2).

14 Moreover, the information obtained during discovery from TMF, Mr. Ickes's consulting  
15 firm (The Ickes & Enright Group), and the DNC reveal no discussions or requests from the DNC  
16 relating to the production of TMF's communications. Therefore, the evidence does not support a  
17 finding that TMF made coordinated communications under the "request or suggestion" or  
18 "substantial discussion" standards of sections 109.21(d)(1) or (3).

19 Finally, there is no evidence that Mr. Ickes was an "agent" of the DNC who, under the  
20 regulations, had the authority to perform certain actions related to the creation, production, or  
21

1 distribution of communications.<sup>19</sup> See 11 C.F.R. §§ 109.3 and 109.21(d)(2) (2004). As noted  
2 above, Mr. Ickes's formal role as a member of the Executive Committee was limited to the  
3 general conduct of the affairs of the DNC, and not its communications. Similarly, his informal  
4 work at the DNC did not involve the creation, production, or distribution of the messages that the  
5 DNC sought to communicate to the public.<sup>20</sup>

6  
7  
8 Accordingly, we recommend that the Commission take no further action with respect to  
9 TMF and the DNC in connection with allegations that they made and received, respectively,  
10 coordinated in-kind contributions.

<sup>19</sup> As explained in the F&LA, a conclusion that TMF made a coordinated communication for the benefit of the DNC is not solely dependent on a determination that Mr. Ickes is an "agent" of the DNC. See 11 C.F.R. § 109.21(d)(2) (2004). For purposes of a national political party committee, under the coordination regulations, an "agent" is defined as:

any person who has actual authority, either express or implied, to engage in any of the following activities....:

- (1) To request or suggest that a communication be created, produced, or distributed.
- (2) To make or authorize a communication that meets one or more of the content standards set forth in 11 CFR 109.21(c).
- (3) To create, produce, or distribute any communication at the request or suggestion of a candidate.
- (4) To be materially involved in decisions regarding: (i) The content of the communication; (ii) The intended audience for the communication; (iii) The means or mode of the communication; (iv) The specific media outlet used for the communication; (v) The timing or frequency of the communication; or, (vi) The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.
- (5) To make or direct a communication that is created, produced, or distributed with the use of material or information derived from a substantial discussion with a candidate.

11 C.F.R. § 109.3(a) (2004).

<sup>20</sup> Mr. Ickes remarked that he occasionally shared the "general view that the Democrats had no message."

IV. CONCILIATION

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16

27044181326

21

22

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14

27044181327

---

23

24

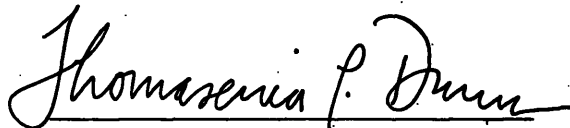
25

V. RECOMMENDATIONS

1. Find probable cause to believe that The Media Fund violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and report its contributions and expenditures;
2. Find probable cause to believe that The Media Fund violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of \$5,000 and 2 U.S.C. § 441b(a) by knowingly accepting corporate contributions;
- 3.
4. Take no further action with respect to allegations that TMF made coordinated expenditures, resulting in excessive in-kind contributions to the DNC Services Corporation/Democratic National Committee and Andrew Tobias, in his official capacity as treasurer, and/or John Kerry for President, Inc.;
5. Take no further action with respect to allegations that the DNC Services Corporation/Democratic National Committee and Andrew Tobias, in his official capacity as treasurer, knowingly accepted excessive in-kind contributions in the form of coordinated expenditures;
6. Close the file with respect to the DNC Services Corporation/Democratic National Committee and Andrew Tobias, in his official capacity as treasurer;
7. Find no reason to believe that the John Kerry for President, Inc. and Robert A. Farmer, in his official capacity as treasurer, violated the Act with respect to allegations that the Kerry Committee received excessive in-kind contributions from The Media Fund via coordinated expenditures;
8. Close the file with respect to John Kerry for President, Inc. and Robert A. Farmer, in his official capacity as treasurer;
9. Approve the appropriate letters.

6/7/07

Date



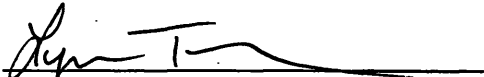
Thomasenia P. Duncan  
General Counsel



Ann Marie Terzaken  
Acting Associate General Counsel



Mark D. Shonkwiler  
Assistant General Counsel



Lynn Y. Tran  
Attorney



Peter G. Blumberg  
Attorney

Attachments

- 1.
- 2.
- 3.
- 4.
- 5.
- 6.
- 7.
- 8.